



Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:)	
)	
Modifying the Commission's Process to Avert)	
Harm to U.S. Competition and U.S. Customers)	IB Docket No 05-254
Caused by Anticompetitive Conduct)	
)	
)	

Digicel USA Inc. and Mossel (Jamaica) Ltd comments on Notice of Inquiry

1. About Digicel USA and Mossel (Jamaica) Ltd

- 1.1 Digicel USA is a corporation organised under the laws of Delaware and is part of the Digicel mobile group operating and with licences to operate in the Caribbean region, currently in nine different territories: Aruba, Barbados, Cayman Islands, Grenada, Haiti, Jamaica, St Lucia, St Vincent & the Grenadines, and Trinidad & Tobago. In September 2005, Digicel entered into an agreement with Cingular Wireless to acquire Cingular's wireless operations in the Caribbean region. Once this acquisition has been completed, Digicel will extend its footprint to a further five countries in the region. Digicel is the fastest growing wireless carrier and the largest GSM mobile operator in the region, and has been instrumental in making market liberalisation in the Caribbean a success, bringing mobile communications to many people who previously had never owned a phone. Many of Digicel's management team also have significant experience working within the mobile and wider telecommunications sector outside the Caribbean region, particularly in Europe.
- 1.2 Mossel (Jamaica) Ltd is a corporation organised under the laws of Jamaica and is also part of the Digicel mobile group. Mossel has various licences to operate telecommunications networks and provide a range of telecommunications services in Jamaica, including the operation of the market leading mobile network and service in Jamaica.

2. Summary of comments

- 2.1 Digicel and Mossel are concerned that the Commission should take care to distinguish between situations of alleged anticompetitive behaviour by foreign carriers (the target of the current NOI and the focus of the Commission's International Settlements Policy) and situations where foreign carriers have been compelled to comply with policy directives issued by the local Government, ie. where there is clearly no issue of anticompetitive behaviour or intent. In particular, Digicel and Mossel would point out that the example given in the NOI regarding a recent situation (June 2005) in Jamaica was quite clearly an example of carriers complying with a Government policy directive and can not be regarded in any way as anticompetitive behaviour.
- 2.2 Secondly, Digicel would again repeat its contention (see in particular Digicel comments and pricing analysis made on 14 January 2005 in response to IB Docket 04-398) that the interests of US consumers would best be served by an examination of the very high retail prices and margins being charged by US carriers for overseas calls. The fact is that, because of these high retail prices and large margins, there is no discernible relationship between the mobile termination charges made by overseas operators and the retail prices paid by US consumers.

3. Assessing anticompetitive behaviour

- 3.1 It seems clear from the Commission's expression of the intention underlying its ISP Policy and the steps which are suggested as means to prevent and deter the practice of "whipsawing" that the harm which it is sought to address is anticompetitive behaviour by foreign carriers intending to increase settlement rates. Digicel and Mossel do not wish at this stage to comment on

the detail of the “improvement” to current procedures suggested in the NOI but do wish to highlight an important distinction between the alleged anticompetitive behaviour which is targeted by such procedures and behaviour by foreign carriers which is limited to compliance with policy directives by the local Government (and which clearly can not be considered as anticompetitive behaviour). In the view of Digicel and Mossel, it can not be appropriate or proportionate to seek to “punish” foreign carriers simply for complying with local laws and regulations, by which they are naturally bound. If the Commission has an objection to any such local Government policy directives, this must be an international issue to be addressed between the Commission, the US Federal Government and the local Government concerned.

3.2 In the case of the Jamaican example included within the NOI, Digicel and Mossel note that this is incorrectly portrayed in the NOI (see in particular paragraph 4 of the NOI) as behaviour which was instigated by the foreign carriers involved (which included Mossel) “with the alleged support and endorsement of their respective governments and regulators”; the implication being that the foreign carriers were indulging in anticompetitive behaviour. In fact, the situation in Jamaica was that all Jamaican international carriers were mandated by a Government Order to increase termination rates for incoming international calls and these Jamaican carriers were simply complying with this legal Order.

3.3 The Government Order in question, dated 19 April 2005, arose as a result of significant debate between the Government of Jamaica, the Jamaican telecommunications regulator (the Office of Utilities Regulation or OUR) and the telecommunications industry concerning the provision and financing of the universal service obligation. The resulting Order makes clear that it is mandatory for holders of the relevant Jamaican telecommunications licenses to comply and refers specifically to section 38(d) of the Jamaican Telecommunications Act which states that “...licensees shall pay the universal service levy in the prescribed manner.” Later, the Order states unequivocally in section 10 that:

“Licensees are required to pay the levy in accordance with the terms of their Licence, and pursuant to section 38(d) of the Telecommunications Act. The manner of payment will be as prescribed above and failure to make the requisite Universal Service Contributions shall be deemed to be a breach of the Licences...”

3.4 Furthermore, it is absolutely clear from the preamble and from section 5 of the Order that the Government of Jamaica fully intended that Jamaican carriers should impose a surcharge on incoming international calls in order to collect the moneys required to fund the universal service obligation:

“...particularly noting the internationally recognized right of sovereign Governments to define and require surcharges for meeting the Country’s universal service requirements, separate from cost-oriented rates...” (Preamble to the Order)

“The levy will be added to the OUR approved and/or contracted termination rates for international inbound calls payable by third parties to the Domestic Network operations....Where rates are

required to be cost-based, the levy shall be in addition to those rates.”
(Section 5 of the Order)

- 3.5 Finally, it is clear both from section 8 of the Order and from a 24 May letter subsequently sent to AT&T Wireless by Minister Paulwell that the Government of Jamaica fully envisaged and supported the actions of Jamaican carriers in blocking incoming international calls from carriers which did not agree to pay the universal service surcharge:

“In the event that any party fails to pay a Terminating Carrier the necessary levy, the Terminating Carrier shall be entitled to suspend the provision of termination services ...” (section 8 of the Order)

“I have assured the carriers...that they have my unqualified support for any legitimate action that must be taken in compliance with the order ... It is therefore likely that carriers who fail to secure rate changes before June 1, 2005 will block the international circuits in order to ensure that their licences are not placed at risk.” (extract from Paulwell letter of 24 May)

- 3.6 Therefore, the actions by the Jamaican carriers to increase incoming international call rates, inter alia, for US carriers can clearly be seen as mere compliance with Government directives under the threat, in the event of non-compliance, of regulatory intervention. Any additional moneys recovered are simply passed onto the Jamaican Government in the form of a universal service contribution. Such actions can not be confused with whipsawing, which by contrast would be voluntary anticompetitive behaviour on the part of carriers seeking to establish a commercial advantage.
- 3.7 Under these circumstances, it seems clear that any attempted measures to counteract such increases in the settlement rate must take the form of international discussions between the two sovereign Governments affected and should not penalise the foreign carriers for simply complying with the local laws and regulations.

4. Interests of US consumers

- 4.1 Digicel wishes to reassert its contention, made and substantiated in detailed pricing analysis in previous submissions to the Commission that US international carriers' retail margins are likely to be a matter of much more significance and relevance to US consumers than the mobile termination rates charged by foreign mobile operators. The relevant parts of Digicel's response of 14 January 2005 in response to IB Docket 04-398 are set out below:

Digicel acknowledges the role of the Commission in addressing issues that affect the interests of US carriers and US consumers. However, Digicel would anticipate that, as regards the issue of mobile termination charges, the Commission's main priority is to protect the interests of US consumers. Digicel's strong belief is that the adoption of the CPP regime in general and the level of mobile termination charges in particular do not have any significant adverse impact on US consumers. It is worthy of note that the Commission's own Notice of Enquiry states that “No comments from US consumers or consumer

groups identified mobile termination rates as a concern”, despite a “mobile surcharge” clearly being advertised by US carriers in most cases.

*Digicel believes that, from a US consumer view, the main concern should be the retail prices and margins being charged by US carriers for overseas calls. Digicel’s own summary review of these prices and margins indicates that very high prices are being charged and very large margins are being generated which bear no relation to, and are not dependent on, the mobile termination charges made by overseas terminating mobile operators. Although it is difficult to make detailed pricing comparisons, given the plethora of different pricing packages and access charges, Digicel’s analysis (see attached Appendix) indicates that the retail price of a call from the US to a Jamaican mobile ranges from USD \$0.43 to \$4.70. This compares with the average termination charge for a call to a Jamaican mobile of just under USD \$0.15 (this figure including both the termination charge and the international settlement charge). **It is worthy of note that the Digicel (Jamaica) retail price for an international call to any overseas destination (ie. including many countries with allegedly “excessive” mobile termination charges) is the equivalent of only USD \$0.29.***

Please note that in making these comparisons Digicel has used the full retail price for the call and not looked in isolation at the “mobile surcharge” typically included by US carriers on calls to overseas mobiles. Digicel will not comment on the retail pricing practice of including a “mobile surcharge” but only notes that this “mobile surcharge” is not related to or justified by the existence of mobile termination charges in countries adopting the CPP pricing regime, particularly where there are very significant margins available from already high “basic” retail prices for international calls. Digicel believes therefore that, to the extent that the Commission intends to conduct further investigations into the issue of the price of calls to overseas mobiles, it should examine the overall retail price of such calls and not simply the “mobile surcharge” element.

Digicel would also question the relevance and accuracy of studies produced by Worldcom and by AT&T quoted in the Notice of Enquiry. No details other than the top line results are given by Worldcom of its study which claims to estimate the impact of mobile surcharges on US customers. However, given the complexity of calculating LRIC based pricing and the legal and economic debate surrounding the correct means of conducting such calculations, Digicel would be very surprised if Worldcom’s calculations included a detailed comparison of mobile settlement rates with the relevant LRIC cost studies for mobile termination (ie. the appropriate LRIC cost for each operator in each country, assuming that such a cost study exists at all). The AT&T study is a reworking of the Commission’s own earlier TCP study but with significant modifications, notably including international transport elements and the use as a baseline price of mobile on-net call prices. Since it is a well known retail pricing approach (in both mobile and fixed communications) to apply significant discounts to on-net calls (thus generating “member get member” activity and enhanced loyalty), it is inappropriate to use the on-net price as a baseline for a TCP calculation. In any case, the relevance of either study in measuring

the impact on US consumers must be in doubt when one considers the very high retail prices being charged and the very high margins being generated from US calls to overseas mobiles.

- 4.2 Digicel therefore remains of the view that, if the FCC's main concern is to protect US consumers, it should focus on US carriers' retail margins rather than foreign mobile termination rates.
- 4.3 Furthermore, Digicel and Mossel would point out that there is a strong US consumer interest in encouraging the development of an adequate communication infrastructure and the wider availability and take-up of communications services in overseas countries. As communications markets develop and mature across the world, the quality and reach of communications improves; more people are contactable; and call completion ratios increase. US consumers stand to benefit disproportionately from such improvements in Jamaica because of the very high proportion of incoming calls to Jamaica originating from the US (over 80% of incoming calls to Jamaica originate in the US).

Respectfully submitted

DIGICEL USA INC. and MOSSEL (JAMAICA) LTD

By: Peter Dunn
Dyoll Building
40 Knutsford Boulevard
Kingston
Jamaica
+1 876 361 1831
peter.dunn@digicelgroup.com